03

Supreme Court, U.S.
FILED

08-225 AUG 21 2008

OFFICE OF THE CLERK

No. 08-

In the Supreme Court of the United States

Our Children's Earth Foundation
and Ecological Rights Foundation,
Petitioners,
v.
United States Environmental Protection Agency,
et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael A. Costa
Our Children's Earth Foundation
3701 Sacramento St. #194
San Francisco, CA 94118
(415) 342-0042

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. May the federal courts employ traditional tools of statutory construction to construct a administrative agency mandatory statutory duty when a statute "strongly suggests" but "does not expressly and unequivocally state" that the agency has a mandatory duty?

2. Has EPA violated its mandatory Clean Water Act (CWA) duty in adopting an effluent guidelines limitations (ELGs) review methodology that amounts to "ignoring Congress' mandate as to what the [EPA's effluent guidelines] regulations and limitations 'shall' accomplish" and reflects an interpretation of the CWA that "strains credulity to the breaking point," "makes no sense?"

PARTIES TO THE PROCEEDING

In accord with Rule 29.6, Petitioner Our Children's Earth Foundation ("OCE") states that it is a non-profit public benefit corporation with offices in San Francisco, California and members throughout the United States. As such, OCE has no parent corporation nor does any publicly held company own 10% or more of the corporation's stock.

Petitioner Ecological Rights Foundation ("ERF") is a non-profit public interest organization public benefit corporation with offices in Garberville, California and members throughout California. As such, ERF has no parent corporation nor does any publicly held company own 10% or more of the corporation's stock.

The Respondents are the United States Environmental Protection Agency (EPA) and Steven L. Johnson, as EPA Administrator; Association of Metropolitan Sewerage Agencies; Effluent Guidelines Industry Coalition; the Utility Water Act Group (UWAG); and the National Association of Clean Water Agencies (NACWA).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. STATUTORY BACKGROUND 3

II. FACTUAL BACKGROUND 5

A. *Prior Relevant Litigation* 5

B. *EPA's Return to Risk-Based Analysis and EPA's 2003 Review of ELGs* 6

1. *EPA's 2003 Review of Existing ELGs* 6

2. *EPA's 2003 Identification of Potential New ELGs Candidates* 9

III. EPA'S 2004 REVIEW OF ELGS 10

A. *EPA's 2004 Review of Existing ELGs* 10

B. *EPA's 2004 Identification of Potential New ELGs Candidates* 12

IV. EPA'S 2005 REVIEW OF ELGS 12

V. THE NINTH CIRCUIT'S CONFLICTING DECISIONS 14

A. *OCE I* 14

B. *OCE II* 16

REASONS FOR GRANTING THE WRIT 18

I. WHEREAS OCE I PROPERLY EMPLOYED TRADITIONAL STATUTORY CONSTRUCTION RULES, OCE II FAILED TO DO SO 18

II. OCE I CORRECTLY APPLIED STATUTORY CONSTRUCTION RULES, AND THE COURT SHOULD REINSTATE OCE I'S RULING 24

III. EPA'S NONDISCRETIONARY DUTY INCLUDES CONSIDERING TECHNOLOGY-BASED FACTORS IN REVIEWING ELGs 25

IV. EPA'S ELG REVIEW IS A JUDICIALLY REVIEWABLE ACTION 26

CONCLUSION 27

APPENDIX CONTENTS

Ninth Circuit Decision on Rehearing (May 23, 2008) 1a

Initial Ninth Circuit Decision (Oct. 29, 2007) . 24a

District Court Decision (May 20, 2005) 59a

Statutory and Regulatory Provisions

28 U.S.C. § 1254 ..... 74a

Clean Water Act

Section 301 [33 U.S.C. § 1311] 79a
Section 304 [33 U.S.C. § 1314] 74a
Section 505 [33 U.S.C. § 1365] 74a

Administrative Materials

Selected excerpts from U.S. Environmental Protection Agency memorandum, Factor 2 Analysis: Technology Advances and Process Changes, Status of Screening Level Review Phase (Dec. 30, 2003), submitted as Exhibit 14 to Plaintiffs' Motion for Summary Judgment filed on February 28, 2005, published on EPA's internet home page at: http://www.epa.gov/waterscience/guide/304m/2004/factor2.pdf. 82a

TABLE OF AUTHORITIES

CASES

Bennett v. Spear,
520 U.S. 154 (1997) 25

Chemical Manufacturers Ass'n v. EPA,
870 F.2d 177 (5th Cir. 1989) 5

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) ..... *passim*

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 26

Dubois v. Thomas,
820 F.2d 943 (8th Cir. 1987) 20

Earth Island Inst. v. Hogarth,
484 F.3d 1123 (9th Cir. 2007) 18, 19, 25

Environmental Defense Fund, Inc. v. Browner,
1995 WL 91324 (N.D. Cal. 1995) 21

Environmental Defense Fund v. Thomas,
870 F.2d 892 (2nd Cir. 1989) 20, 27

EPA v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976) 3, 4

Farmers Union Cent. Exch., Inc. v. Thomas,
881 F.2d 757 (9th Cir. 1989) 23

Florida PIRG v. EPA,
386 F.3d 1070 (11th Cir. 2004) 25

Laub v. U.S. Dep't of Interior,
342 F.3d 1080 (9th Cir. 2003) 26

Monongahela Power Co. v. Reilly,
980 F.2d 272 (4th Cir. 1992) 20

National Resources Defense Council v. EPA,
437 F. Supp.2d 1137 (C.D. Cal. 2006) 21

Norton v. Southern Utah Wilderness Alliance,
542 U.S. 55 (2004) 26, 27

NRDC v. Costle, 8 Env't Rep. Cas. (BNA) 2120
(D.D.C. 1976), *modified sub. nom, NRDC v. Costle*,
12 Env't Rep. Cas. (BNA) 1833 (D.D.C.1976),
modified sub. nom, NRDC v. Gorsuch, 17 Env't.
Rep. Cas. (BNA) 2013, 12 Envtl. L. Rep. 20570
(D.D.C.1982), *modified sub. nom; NRDC v.*
Ruckelshaus, No. 73-2153
(D.D.C. Aug. 2, 1983) 5

NRDC v. Reilly,
1991 U.S. District LEXIS 5334 (D.D.C. Apr. 23,
1991) 6

NRDC v. Train,
510 F.2d 692 (D.C. Cir. 1975) 3, 5, 21

Our Children's Earth Foundation, et. al., v. United
States Environmental Protection Agency, et al.,
("OCE I"), 506 F.3d 781 (2007) . . . . . *passim*

Our Children's Earth Foundation, et. al., v. United States Environmental Protection Agency, et al. ("OCE II"), 527 F.3d 842 (9th Cir. 2008) . . *passim*

Save the Valley, Inc. v. EPA,
99 F. Supp.2d 981 (S.D. Ind. 2000) 21

Sierra Club v. Browner,
130 F. Supp.2d 78, 90 (D.D.C. 2001) 21

Sierra Club v. Thomas,
828 F.2d 783, 791 (D.C. Cir. 1987) 22, 23

Sierra Club v. Train,
557 F.2d 485 (5th Cir. 1977) 21

S.F. BayKeeper v. Whitman,
297 F.3d 877 (9th Cir. 2002) 20

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 19

STATUTES

28 U.S.C. § 1254 1

Clean Water Act

Section 301 [33 U.S.C. § 1311] . . . . . *passim*
Section 304 [33 U.S.C. § 1314] . . . . . *passim*
Section 505 [33 U.S.C. § 1365] 2, 25

ADMINISTRATIVE MATERIALS

40 C.F.R. part 414 8
40 C.F.R. part 419 8

55 Fed. Reg. 80 (Jan. 2, 1990) 6
68 Fed. Reg. 75515 (Dec. 31, 2003) ..... *passim*
69 Fed. Reg. 53705 (Sept. 2, 2004) ..... *passim*
70 Fed. Reg. 51042 (Aug. 29, 2005) 13

OPINIONS BELOW

The district court decision was unreported and is reproduced in the Appendix (App.) at page 59a. The court of appeals decisions are reported at 506 F.3d 781 (9th Cir. 2007) and 527 F.3d 842 (9th Cir. 2008) and are reproduced at App. 24a and 1a, respectively.

JURISDICTION

The ruling of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed was issued on May 23, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are Clean Water Act §§ 304(b), (m), 301(b)(2)(A)(i), (C), (D), and (F); 33 U.S.C. §§ 1314(b), (m) and 33 U.S.C. § 1311 (b)(2)(A)(i), (C), (D), and (F). They are set forth in full in the Appendix.

STATEMENT OF THE CASE

Petitioners OCE and ERF submit this Petition for *Certiorari* seeking reversal of the U.S. Court of Appeals for the Ninth Circuit's decision in *Our Children's Earth Foundation, et. al., v. United States Environmental Protection Agency, et al.*, 527 F.3d 842 (9th Cir. 2008) (*"OCE II"*)–which reversed on rehearing the Ninth Circuit's earlier published decision in *OCE v. U.S. EPA ("OCE I")*, 506 F.3d 781 (2007).

OCE II improperly reversed *OCE I*s holding that EPA has a "non-discretionary" duty reviewable under Clean Water Act ("CWA") § 505(a)(2)[1] to consider the technology-based factors set forth in CWA § 304(b) and § 301(b)[2] in EPA's reviews of CWA effluent guidelines and limitations ("ELGs"). *OCE II* created an intra- and inter-circuit split in authority in erroneously holding, contrary to its ruling in *OCE I*, that traditional principles of statutory construction and/or the framework for judicial review set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), cannot be used to determine whether a statute imposes a mandatory duty on an administrative agency. Accordingly, to re-establish long-standing rules of statutory construction as they apply to an

---

[1] 33 U.S.C. § 1365(a)(2). Sections of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, are conventionally cited using the sections of the original Act, rather than the section numbers assigned after codification in the U.S. Code. This brief follows this convention. The first time Petitioners cite to a provision of the Act, a parallel citation to the U.S. Code has been included. All citations are to the CWA unless indicated otherwise.

[2] 33 U.S.C. §§ 1314(b), 1311(b).

important question of administrative law, this Court should grant *certiorari*.

I. STATUTORY BACKGROUND

Prior to 1972, federal law only regulated water pollution discharges specifically shown to be environmentally harmful. In 1972, recognizing that this approach had failed, Congress enacted sweeping new law requiring industries to meet discharge limitations based on application of the best available water pollution control technology economically achievable. *See EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 202-05 (1976).[3]

Congress further intended its new technology-based approach to institute *uniform* national standards of pollutant control, thus eliminating competitive advantages to industrial sources regulated more leniently by local authorities than comparative sources elsewhere in the country. *See NRDC v. Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1975).

Congress' technology-based regulatory scheme is reflected in CWA §§ 304(b), (m), and 301. CWA § 304(b) requires EPA to promulgate effluent guidelines establishing the water pollutant discharge reduction that industries can attain via the application of "best practicable technology" (BPT), "best available technology" (BAT) for toxic and non-conventional pollutants and "best conventional pollutant control technology" (BCT) for conventional pollutants. EPA must promulgate

---

[3] All references "App. Xa" are to the pagination of the Petitioners' Appendix.

effluent guidelines for all categories of industries which discharge pollutants to the nation's waters. CWA § 304(b). The CWA specifies that EPA and state agencies must use effluent guidelines in setting effluent limitations required by CWA section 301(b). Such effluent limitations restrict the amount of pollution that any point source may discharge to waters. *See generally, California ex rel.*, 426 U.S. at 204.

Congress envisioned that EPA would make ELGs more stringent over time. The CWA requires EPA to have mandated BPT-based limits by 1977 and more stringent BAT and BCT-based limits by 1989. CWA § 301(b). Moreover, Congress envisioned that EPA would periodically revise its definitions of BPT, BAT and BCT to press industry to adopt more advanced pollutant reducing technologies, eventually leading to the elimination of water pollutant discharges. *See* CWA § 301(b)(2) (mandating effluent limitations that "require the elimination of discharges of all pollutants" if EPA finds "such elimination is technically and economically achievable"); *see also* CWA § 304(b)(3).

To ensure that effluent guidelines are updated to reflect current pollution control technology, Congress required EPA to review all effluent guidelines annually, and if appropriate, revise them. CWA §§ 304(b), (m)(1)(A). To ensure that revisions to effluent guidelines lead to revisions in enforceable effluent limitations, Congress further required EPA to review all BAT-based effluent limitations at least every five years and, if appropriate, revise them "pursuant to the procedure established under CWA §

301(b)(2)" for setting BAT limitations.[4] CWA § 301(d).

Congress amended the CWA in 1987 to require EPA to publish biennial effluent guidelines plans which, *inter alia*, schedule the annual review of all existing ELGs. CWA § 304(m)(1).

II. FACTUAL BACKGROUND

A. *Prior Relevant Litigation*

EPA has been persistently dilatory in adopting and revising ELGs as required by the CWA, leading to multiple citizen suits and court orders forcing EPA to act.[5] EPA did not issue its first EGP until 1990, nearly two years past CWA § 304(m)'s 1988 deadline for this plan. In this 1990 Plan, EPA contended it did not have to identify and schedule promulgations of new effluent guidelines for all categories of industries not currently regulated by effluent guidelines that discharge toxic or nonconventional pollutants. EPA contended it could limit its efforts to industries posing the greatest relative risk of environmental harm, effectively deferring effluent guideline development for

---

[4] EPA has implemented CWA §§ 301(b) and 304(b) through a single set of regulations that constitute both effluent guidelines and effluent limitations. 527 F.3d at 849.

[5] *See Chemical Manufacturers Ass'n v. EPA*, 870 F.2d 177, 195, n.9 (5th Cir. 1989); *NRDC v. Train, supra*, 510 F.2d at 710-712; *NRDC v. Costle*, 8 Env't Rep. Cas. (BNA) 2120 (D.D.C. 1976), *modified sub. nom*, *NRDC v. Costle*, 12 Env't Rep. Cas. (BNA) 1833 (D.D.C.1976), *modified sub. nom*, *NRDC v. Gorsuch*, 17 Env't. Rep. Cas. (BNA) 2013, 12 Envtl. L. Rep. 20570 (D.D.C.1982), *modified sub. nom*; *NRDC v. Ruckelshaus*, No. 73-2153 (D.D.C. Aug. 2, 1983); 68 Fed. Reg. 75515, 75519 (Dec. 31, 2003).

unregulated categories of industry deemed by EPA to be relatively less risky. 55 Fed. Reg. 80, 81-82 (Jan. 2, 1990).

EPA's 1990 Plan was found unlawful in *NRDC v. Reilly*, 1991 U.S. District LEXIS 5334 (D.D.C. Apr. 23, 1991). The court found that "in light of the compelling need for federal effluent guidelines, the well documented history of agency inertia, and the general structure of the Act," EPA's intent to "prioritize" its promulgation of new effluent guidelines by relative ranking of risk was "inadequate and not in conformity with the mandate" of the CWA. *Id.* at *25-26. EPA subsequently entered into a consent decree, which lasted until 2004, that required EPA to schedule promulgation of a specified number of new or revised effluent guidelines.

B. *EPA's Return to Risk-Based Analysis and EPA's 2003 Review of ELGs*

1. *EPA's 2003 Review of Existing ELGs*

On December 31, 2003, EPA published its proposed effluent guidelines plan to govern EPA's first post-*Reilly* effluent guidelines review, to be conducted in 2004 and 2005. 68 Fed. Reg. 75515 (Dec. 31, 2003) ("Proposed 2004 EGP"). The Proposed 2004 EGP also described EPA's 2003 ELGs review. The Proposed 2004 EGP proposed a two-year EPA review involving a screening level analysis in the first year and a more-detailed analysis of two of EPA's 56 effluent guidelines in the second year. *Id.* at 75522.

The Proposed 2004 EGP indicated EPA had returned to the risk-based prioritization approach rejected by the court in *NRDC v. Reilly*. Specifically,

EPA indicated it planned to identify industries posing the greatest relative risk of water pollution impacts and target these industries for revision of existing effluent guidelines where such industries were already covered by effluent guidelines or adoption of new effluent guidelines where such industries were not yet regulated. Employing this methodology, EPA limited its 2003 review of ELGs to attempted identification of a small subset of categories of industry posing the greatest relative hazard to water quality. *Id.* at 75521. EPA did not evaluate whether economically achievable technology was available that would warrant more stringent ELGs for *any* categories of industries and thus reached no conclusions in this respect:

> For a number of the industries that appeared to offer the greatest potential for reducing hazard or risk to human health or the environment, EPA attempted to gather and analyze additional data *prior to commencing detailed and costly economic and technology studies.* EPA examined: (1) The pollutants driving the hazard or risk estimates; (2) the geographic distribution of facilities in the industry; (3) any discharge trends within the industry; and (4) possible links between industrial point source discharges and impaired waterbodies identified by EPA, States, and Tribal governments under CWA section 303(d).

Id. at 75523 (emphasis added).[6]

---

[6] EPA explained that it had found it too difficult to compile and/or analyze technological or economic feasibility factors to screen existing ELGs. *Id.* at 0112-13; App. 82a - 84a.

In 2003, EPA further eliminated from review categories of ELGs when EPA found that: (1) there was a lack of available risk assessment data for an industry, (2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately conducted on a facility-by- facility basis because an industry had only a few facilities or (4) EPA had promulgated an effluent guideline for the industry within the last seven years. *Id.* at 75521, 75523; 69 Fed. Reg. 53705, 53711, 53716-17 (Sept. 2, 2004).

Employing its "screening" methodology, EPA identified only two existing ELGs for detailed evaluation in 2004.[7] 68 Fed. Reg. at 75523-24. EPA thus effectively ignored considerable information it had received, though not analyzed, on advances in water pollution abatement technology in a wide variety of industries. *Id.* at 75522-2; App. 82a - 91a. For example, EPA acknowledged that it: (1) had "Sector Notebooks" compiling pollution control technology information on 23 industry sectors, (2), had recently co-sponsored a conference devoted to identifying new water pollution abatement technologies, (3), was aware of extensive information on such technologies documented in industry trade association publications, and (4) had gathered

---

[7] These were the ELGs for the Organic Chemicals, Plastics and Synthetic Fibers (OCPSF) industrial category set forth at 40 C.F.R. part 414 and the ELGs for the Petroleum Refining category set forth at 40 C.F.R. part 419.

detailed information on the pollution abatement technologies available in five industry sectors and was gathering such additional information on 15 more industry sectors. *Id.* EPA did not analyze this information, however, to reach any conclusions whether technological advances documented in such information sources might constitute basis for new definition of BPT, BAT or BCT. *Id.* at 0187; 68 Fed. Reg. at 75521.

2. *EPA's 2003 Identification of Potential New ELGs Candidates*

EPA further concluded in its 2003 review that because it could not identify any industries discharging toxic or non-conventional pollutants not already covered by existing ELGs, it would not schedule any new ELGs promulgations in its 2004 EGP. 68 Fed. Reg. at 75529. EPA acknowledged that commentors on EPA's Draft Strategy had suggested thirteen potential new categories of industries not currently regulated as targets for new ELGs. *Id.* at 75530. EPA further acknowledged that EPA itself had identified two industries not currently regulated by ELGs.[8] *Id.* at 75528-30. EPA decided not to identify these industries and schedule new ELGs promulgation for them under CWA § 304(m)(1)(B) and (C), however. *Id.* at 75529. EPA decided it need schedule new ELGs only if: (1) discharges from unregulated industries pose a significant environmental risk, (2) the industries have more than a few facilities, and (3) the

---

[8] These were chemical formulating, packaging, and repackaging operations and petroleum bulk stations and terminals.

industries are not "subcategories" of industries regulated by existing ELGs. *Id.*

III. EPA'S 2004 REVIEW OF ELGS

On September 2, 2004 EPA issued its EGP for 2004 and 2005 ("2004 EGP"). 69 Fed. Reg. 53705.

A. *EPA's 2004 Review of Existing ELGs*

The 2004 EGP indicated that EPA repeated the same water quality risk-based screening level approach from 2003 to identify a small subset of industries whose ELGs EPA would consider revising in 2005. 69 Fed. Reg. at 53710. EPA's 2004 review did not examine whether economically achievable improved technologies existed for any industries besides the small subset EPA targeted in 2003 for more focused review. *Id.* The 2004 EGP stated EPA's intent to continue its risk assessment approach to "screen" which effluent guideline and effluent limitation categories should be reviewed in 2005 and 2006. *See id.* at 53717.

In 2004, EPA further copied its 2003 approach to eliminate ELGs from review when EPA determined that: (1), there was a lack of available risk assessment data for an industry, (2) the water pollution problems caused by an industry were being dealt with more "efficiently" by other regulatory and non-regulatory means, (3) regulation of an industry was more appropriately conducted on a facility-by-facility basis because there were only a few facilities in the industry or (4) EPA had promulgated an effluent guideline for the industry within the past seven years. *Id.* at 53716-17.

Employing its screening methodology, EPA only considered in 2004 whether revisions were appropriate for the two ELGs EPA had determined

warranted more study in 2003, plus two additional subcategories of ELGs.[9] EPA determined that two subcategories of these industries warranted further study in years ahead "for possible effluent guidelines revision." *Id.* at 53712.[10] EPA ruled out revision of the ELGs for most of these industries targeted for focused review not because EPA determined that there were no new economically achievable technologies for these industries, but because (1) the industries' discharges did not, in EPA's estimation, pose the environmental risk EPA saw as potentially possible based on its screening analysis or (2) the industries consisted of only a few facilities. *Id.* at 53712-16. EPA concluded whether more effective economically achievable pollutant reduction technology is available for only one subcategory of the 450 subcategories of industry covered by EPA ELGs (which EPA concluded there was not). *Id.* at 53712. Thus, EPA ended its 2004 review certain only that of the 450 subcategories of existing ELGs, only one still appropriately defines BPT, BAT, and BCT.

As in 2003, EPA thus effectively ignored considerable information it had on advances in

---

[9] The two categories of industry were the OCPSF industry and petroleum refining. The two subcategories were chlor-alkali manufacturing, a subcategory of the inorganic chemicals industry, and the subcategory of the oil and gas extraction industry consisting of oil and gas production and exploration facilities in Cook Inlet, Alaska.

[10] The two subcategories were: the vinyl chloride manufacturing subcategory of the OCPSF category and chlor-alkali manufacturing.

pollution abatement technology for various industries. *Id.* at 53714-15; App. 82a - 91a; 68 Fed. Reg. at 75522-23. For example, EPA had a state agency study on advances in pollution abatement technology in the petroleum industry. EPA declined to analyze or reach conclusions, however, whether the technologies documented in that study warranted new definitions of BPT, BAT or BCT because EPA found it had insufficient evidence that the petroleum industry's current discharges pose risk of environmental harm. App. 82a - 91a; 69 Fed. Reg. at 53714-15; 68 Fed. Reg. at 7522-23.

B. *EPA's 2004 Identification of Potential New ELGs Candidates*

EPA identified in its 2004 EGP two industries not yet regulated by existing ELGs, hence candidates for new ELGs.[11] 69 Fed. Reg. at 53719-20. Even for these new categories, however, EPA did not set a schedule for enacting new ELGs within three years as specified by CWA § 304(m)(1)(C). EPA indicated it would commence rulemaking proceedings for new ELGs for these industries, but EPA expressly reserved the possibility of not completing the rulemaking. *Id.* at 53719. EPA further reiterated its view that it had discretion not to schedule promulgation of new ELGs for industries currently lacking ELGs that discharge toxic and nonconventional pollutants under CWA § 304(m)(1)(B) and (C). *Id.* at 53718-19.

IV. EPA'S 2005 REVIEW OF ELGS

EPA's 2005 review of existing ELGs copied the

---

[11] The industries were airport deicing operations and drinking water supply and treatment.

same risk-based screening methodology EPA employed in 2003 and 2004. EPA again ruled out revision of ELGs based on EPA's finding that an industry posed relatively less risk of receiving water harm than the couple industries EPA deemed posed the most risk. 70 Fed. Reg. 51042, 51047-500 (Aug. 29, 2005). EPA ran into the same risk assessment problems it had in 2003 and 2004, often conceding that data available to it was inconclusive on whether an industry is actually posing receiving water risks. *Id.* at 51052. EPA again conceded it mostly had failed to examine whether technologies currently serving as the basis for BAT and BCT in existing ELGs had been superseded by more modern pollutant reduction technologies. EPA did *start* such a technology-based analysis for two categories of industry, but EPA was unable to even complete those two analyses. *Id.* at 51049. Thus, EPA reached no conclusions after its 2005 review whether *any* of its ELGs still appropriately define BPT, BAT and BCT and did not commence any new ELGs promulgation based on its 2005 review.

EPA's 2005 review of industry candidates for new ELGs similarly copied EPA's approach in 2003 and 2004. EPA again deemed it could decline to schedule new effluent guideline promulgation for currently unregulated industries if: (1) EPA has not found these industries' discharges not to pose substantial risk of receiving water harm, (2) the industry consists of only a few facilities, or (3) the industries are within "subcategories" of existing ELGs. On these bases, EPA did not schedule any new ELGs promulgation. *Id.* at 51056-57.

V. THE NINTH CIRCUIT'S CONFLICTING DECISIONS

A. *OCE I*

In *OCE I*, the Ninth Circuit held that EPA has a non-discretionary CWA duty to consider technology-based factors set forth in CWA § 304(b) and § 301(b) when determining whether to revise ELGs. The Ninth Circuit noted that "the overall structure of the Act strongly counsels that any review to determine whether revision is appropriate must contemplate the mandatory technology-based factors," set forth in CWA § 304(b) and § 301(b), though the Ninth Circuit further found that "the statute does not expressly and unequivocally state as much." 506 F.3d at 792. The Ninth Circuit proceeded alternately to employ traditional principles of statutory construction and/or the second step of the *Chevron* framework to find EPA has a nondiscretionary duty to consider these CWA § 304(b) and § 301(d) factors when reviewing ELGs. 506 F.3d at 792-93.

The Ninth Circuit's majority opinion in *OCE I* noted the dissentor's criticism of its use of the *Chevron* framework, but deflected this criticism by noting, one, that it would reach the same result under traditional principles of statutory construction or the *Chevron* framework–and that the latter only "gives the EPA the benefit of any ambiguity or doubt in analyzing these interlocking statutory provisions." *Id.* at 792.

In construing the CWA statutory provisions in issue, in keeping with traditional principles of statutory construction and step one of the *Chevron* framework, the Ninth Circuit first considered the

facial meaning of these provisions. The Ninth Circuit found that it was a close question whether these provisions had a facially plain unambiguous meaning:

> The statute *all but explicitly states* that the review is governed by the revision standards [set forth in CWA section 304(b)].

Id. at 792 (emphasis added).

The Ninth Circuit proceeded to point out that when the provisions in issue where looked at in context, "The only reasonable interpretation of the . . . provisions is that they tie the review and revision to § 304(b) and § 301(b), respectively, both of which mandate a technology-based approach." *Id.*

Second, the Ninth Circuit looked at "the common sense reading of the Statute" and found that "[i]t makes no sense that Congress would require promulgation and revision tethered to technology-based requirements, but would somehow silently render discretionary the choice as to whether to review in light of the statutorily-required technological criteria." *Id.* at 792-93.

Third, the Ninth Circuit examined EPA's past interpretation of the CWA and noted that EPA had previously believed it was required to consider CWA § 304(b) and § 301(b)'s technology-based factors when completing its ELGs reviews. *Id.* at 793.

Fourth, the Ninth Circuit noted that CWA legislative history reveals that Congress intended the CWA to force the advancement of pollution control technology with the goal of eliminating the discharge of pollutants altogether, rather than simply attempting to reduce the relatively greatest pollution risks:

> [legislative history] demonstrate[s] that a fundamental purpose of the Act was to shift pollution control from a focus on receiving water quality to a focus on the technological control of effluent.

Id. at 794.

Employing these traditional statutory construction tools, the Ninth Circuit concluded that "[a]lthough the EPA may determine in its exercise of discretion that no revision is appropriate, in conducting its review to reach that decision, the Agency must attend to the technology-based factors specifically prescribed by the CWA." *Id.* at 795.

B. *OCE II*

In *OCE II*, the Ninth Circuit reaffirmed its observations that the CWA plainly intended that EPA review and consider the capabilities of pollution reducing technologies in promulgating ELGs:

> The plain language of these [relevant CWA] provisions reflects that the CWA repeatedly mandates a technology-based approach as a non-discretionary matter in the promulgation of the [EPA ELG] regulations, at least as one methodology among others.

527 F.3d at 850.

The Ninth Circuit also reaffirmed that the CWA plainly mandates that EPA revise ELGs to keep pace with technological innovation allowing for greater pollution reduction:

> Further, the statute makes clear that the regulations must comport with technological criteria that change over time. The statutory language is unambiguous that *revision* decisions, although discretionary as indicated

> by the "if appropriate" language, are constrained by the statute's mandate as to what "such regulations" "shall" accomplish. The statute states that the regulations "shall" account for the technological factors without distinguishing between promulgation and revision.

Id. at 850-51

Finally, the Ninth Circuit again observed that "the overall structure of the [Clean Water] Act strongly suggests that any *review* to determine whether revision [of ELGs] is appropriate should contemplate the mandatory technology-based factors" set forth in CWA section 304(b) that EPA must consider when promulgating new or revised ELGs. *Id.* at 851. The Ninth Circuit reversed its *OCE I* decision, however, based on a conclusion that the CWA "does not expressly and unequivocally state" that EPA must consider CWA section 304(b)'s technology-based factors or otherwise consider the capabilities of currently available technologies in deciding whether to update ELGs. *Id.* The court further held that it could only find that EPA had a mandatory duty to consider CWA section 304(b)'s technology-based factors or otherwise consider the capabilities of currently available technologies in deciding whether to update ELGs if the CWA's language contained such a facially unequivocal command. *Id.*

REASONS FOR GRANTING THE WRIT

I. WHEREAS OCE I PROPERLY EMPLOYED TRADITIONAL STATUTORY CONSTRUCTION RULES, OCE II FAILED TO DO SO.

In *OCE I*, the Ninth Circuit correctly employed traditional tools of statutory construction and/or the *Chevron* second step framework in holding that EPA has a "non-discretionary" duty to consider the technology-based factors set forth in CWA § 304(b) and § 301(b) in its required reviews of ELGs. As this Court has instructed:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

Chevron, 467 U.S. at 843 n.9 (citations omitted) (emphasis added). *See also Earth Island Inst. v. Hogarth*, 484 F.3d 1123, 1131 (9th Cir. 2007) (Agency statutory "[c]onstructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement must be rejected.").

In *OCE I*, the Ninth Circuit simply followed this *Chevron* instruction in employing the following traditional tools of statutory construction: (1), a review of the whole context of the CWA statutory language, (2), a common sense reading of the whole statute, i.e., an analysis of what Congress meant the

CWA to accomplish and how, (3), consideration of EPA's prior inconsistent interpretation of the CWA provisions in issue, and (4), applicable legislative history. 506 F.3d at 792-93. Employing these tools, the Ninth Circuit ascertained a "clear congressional intent" within the meaning of *Chevron* that EPA *must* consider the technology-based criteria in CWA § 304(b) and § 301(b) in reviewing its ELGs. *Id.* at 792-95.

In *Chevron*, this Court further instructed that if after considering traditional principles of statutory construction, the proper conclusion is that "Congress did not actually have an intent regarding the" statutory provision in issue, then the Ninth Circuits must defer to an agency's interpretation of a statute it administers if this interpretation "is a reasonable one." 467 U.S. at 845; *see also Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 481(2001); *Hogarth*, 484 F.3d at 1131 ("Deference is due only to a 'reasonable interpretation'" of a statute by a federal agency). This is commonly referred to as the second step of the *Chevron* framework. *See, e.g.,* 506 F.3d at 792. In *OCE I*, the Ninth Circuit noted that even if EPA were to be given the benefit of the doubt called for by the *Chevron* second step framework, "the result is the same" because EPA's interpretation of the relevant CWA provisions is unreasonable. *Id.*

OCE I followed a frequent and familiar approach. Indeed, prior to *OCE II*, no court of appeals decision held that the courts may not employ traditional statutory construction tools and/or a *Chevron* second step analysis to determine whether an agency's statutory obligations are mandatory. Instead, numerous decisions routinely employed the

same traditional principles of statutory construction and/or a *Chevron* second step analysis to determine whether a statute evinces a "clear congressional intent" to impose mandatory duties on federal agencies. For example, the Ninth Circuit recently followed just this approach in *S.F. BayKeeper v. Whitman*, 297 F.3d 877, 885 (9th Cir. 2002). In *BayKeeper*, the Ninth Circuit found CWA § 303(d) facially unclear as to whether EPA had a mandatory duty to establish certain "total maximum daily loads" on allowable pollutant discharge. The Ninth Circuit employed a *Chevron* second step analysis to determine whether EPA's interpretation that it lacked such a mandatory duty was reasonable. *Id.* Courts of Appeals in other circuits have followed the same approach. In *Environmental Defense Fund v. Thomas*, the Second Circuit employed traditional tools of statutory construction, including review of applicable legislative history, to determine that the district court had jurisdiction to compel the Administrator to fulfill his Clean Air Act ("CAA") mandatory duty to make some formal decision as to whether or not to revise certain air pollution regulations. 870 F.2d 892, 900 (2nd Cir. 1989). In *Dubois v. Thomas*, the Eighth Circuit, finding CWA § 309 not facially determinative as to whether EPA has a mandatory enforcement duty, reviewed the legislative history and then resorted to a *Chevron* second step analysis to determine this mandatory duty question. 820 F.2d 943, 948-49 (8th Cir. 1987); *see also Monongahela Power Co. v. Reilly*, 980 F.2d 272, 278, n. 6 (4th Cir. 1992) ("the existence of a nondiscretionary duty could be recognized through application of *Chevron's* rule of construction."); *see*

also National Resources Defense Council v. EPA ,437 F. Supp.2d 1137, 1157-62 (C.D. Cal. 2006) (employing traditional rules of statutory construction, including consideration of overall statutory purpose and applicable legislative history, and *Chevron* second step consideration of reasonableness of EPA interpretation to determine if EPA had failed to comply with a nondiscretionary duty to promulgate certain ELGs); *Sierra Club v. Browner*, 130 F. Supp.2d 78, 90 (D.D.C. 2001) (*Chevron* review is appropriate when citizen brings suit claiming agency has failed to perform nondiscretionary duty); *Save the Valley, Inc. v. EPA*, 99 F. Supp.2d 981, 984-86 (S.D. Ind. 2000) (examining legislative history to construe ambiguous CWA § 309 to impose mandatory duty on EPA to enforce the CWA); *Environmental Defense Fund, Inc. v. Browner*, 1995 WL 91324, *2 (N.D. Cal. 1995) (engaging in *Chevron* second step review to determine if the Agency had failed to comply with a CAA nondiscretionary duty to promulgate certain rules by required deadline).

In *Sierra Club v. Train*, the Fifth Circuit found that it could not resolve whether EPA has a nondiscretionary duty to enforce the CWA based solely on the statutory language. 557 F.2d 485 (5th Cir. 1977). Noting that "[t]he substantive issue in this case is one of statutory construction," the Fifth Circuit then turned to the same "extrinsic aids" utilized by the Ninth Circuit in *OCE I* but rejected by the Ninth Circuit in *OCE II*: the "administrative agency's interpretation, along with the legislative history and the statute as a whole." *Id.* at 489. For additional example, in *NRDC v. Train*, the D.C.

Circuit found CWA § 304(b)(1)(A) ambiguous as to whether EPA had a nondiscretionary duty to promulgate certain ELGs by 1973. 510 F.2d at 706-710. The D.C. Circuit turned to legislative history to discern what part of EPA's duty was mandatory: "It is our view that the Act *and its legislative history* rein in the Administrator's discretion." *Id.* at 706 (emphasis added).

OCE II relies upon the Ninth Circuit's contrary reading of a single case, *Sierra Club v. Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987). The Ninth Circuit's *OCE II* decision, however, misconstrues that case. In *Thomas*, the D.C. Circuit expressly acknowledged that a mandatory duty need not be expressly stated by a statute, but instead can be, in some circumstances, implied by a statute. *Id.* at 791. The D.C. Circuit did hold that it could not infer a mandatory duty from the "from the overall scheme" of the specific Clean Air Act provisions in issue in that case, not because the court found it always improper *per se* when faced with an ambiguous statute to construct a mandatory duty using traditional statutory construction tools, but because the CAA provisions in issue did not lend themselves to such a construction. In *Thomas*, the D.C. Circuit faced a narrow type of mandatory duty issue *not at issue in this case*: whether agency delay in promulgating regulations can constitute breach of a mandatory duty or at most unreasonable delay in performing a discretionary duty when a statute contains no explicit deadline for promulgating the regulations. As the D.C. Circuit pointed out, finding that an agency has a mandatory duty to promulgate regulations when Congress has created no "readily

ascertainable" deadline for action is essentially akin to holding that an agency has a mandatory duty not to unreasonably delay its action. To hold that agencies have a mandatory duty not to unreasonably delay would be no different, at the end of the day, from holding that agencies have a mandatory duty not to abuse their discretion. This would, of course, make every administrative action necessarily a mandatory duty–thus negating the long-recognized distinction between claims for mandatory breach and abuse of discretion. *Id.* at 792. In contrast to *Thomas*, upholding Petitioners' claim in this case does not require transforming all administrative actions into mandatory duties. Petitioners here argue only that EPA must consider certain criteria, set out by Congress in CWA section 304(b), in performing ELG reviews that the CWA mandates be performed by a date certain: once every year. Using traditional tools of statutory construction to transform the CWA's "strong suggestion" that EPA consider these criteria in performing EPA's ELG reviews into an EPA mandatory duty would not, as in *Thomas*, lead to all administrative actions being viewed as mandatory duties.[12]

---

[12] The dissent in *OCE I* (though not the Ninth Circuit decision in *OCE II*) also sought to rely on *Farmers Union Cent. Exch., Inc. v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989), but this reliance, too, was misplaced. *Farmers* noted, without expressly agreeing, that some Courts have found that only "a clear-cut" nondiscretionary duty gives rise to CAA citizen suit jurisdiction. The decision says nothing, however, about *how* Courts are to determine whether nondiscretionary duties are clear-cut and certainly does not support that Courts may not employ traditional statutory construction tools or *Chevron* Second Step analysis to find such duties.

II. OCE I CORRECTLY APPLIED STATUTORY CONSTRUCTION RULES, AND THE COURT SHOULD REINSTATE OCE I'S RULING.

As noted, in *OCE I*, the Ninth Circuit did not defer to EPA's interpretation of the CWA provisions in issue because this interpretation ignored the statute's whole context, common sense reading and applicable legislative history and furthermore was inconsistent with prior EPA interpretations. 506 F.3d at 792-93. *OCE II* did not reverse or criticize *how* the Ninth Circuit used traditional statutory construction tools and/or *Chevron* second step analysis in *OCE I*. *OCE II* merely found it unnecessary to use traditional statutory construction tools and/or conduct *Chevron* second step analysis. *See* 527 F.3d at 851.

Thus, *OCE II* essentially left intact that EPA's statutory interpretation of the CWA, once examined using traditional statutory construction tools or the *Chevron* second step framework, "strains credulity to the breaking point," "makes no sense," and amounts to "ignoring Congress' mandate as to what the [EPA's effluent guidelines] regulations and limitations 'shall' accomplish"–requiring industries to limit their pollution discharges to the level achievable with up-to-date technologies. 506 F.3d at 795, 792-93. Thus, *OCE II* now leaves judicial power so truncated as to allow EPA the latitude to administer the CWA in a fashion grossly at odds with clear congressional intent–as revealed by well-familiar tools of statutory construction–simply

because halting this EPA approach would require looking beyond the immediate clauses of the statute in issue to construct a mandatory duty using those tools. This radical truncation of judicial review must be rejected. As discussed above, *OCE II* departed from ample precedent in rejecting that traditional statutory construction tools and/or the *Chevron* second step framework could and should be used to construct a mandatory EPA duty reflective of Congress's clear intent.

III. EPA'S NONDISCRETIONARY DUTY INCLUDES CONSIDERING TECHNOLOGY-BASED FACTORS IN REVIEWING ELGs.

Before the Ninth Circuit, EPA erroneously argued that, under CWA § 505, a district court's jurisdiction extends only to ordering it to do an ELG review, but not to directing it as to whether to consider CWA § 304(b) and § 301(b)'s technology-based criteria in performing this review. EPA ignored *Bennett v. Spear*'s directive "that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." 520 U.S. 154, 172 (1997); *see* 506 F.3d at 793; *see also Hogarth,* 484 F.3d at 1131 (agency "may not ignore factors Congress required be taken into account"). In sum, the Ninth Circuit in *OCE I* heeded well-established rules in finding that EPA mandatory duties, and thus CWA § 505 jurisdiction, extend to considering factors that Congress mandated EPA to consider when reaching an ultimately discretionary decision. *See also Florida PIRG v. EPA*, 386 F.3d 1070, 1087-88 (11th Cir. 2004) (EPA has mandatory duty to consider

statutory criteria for decisions as "the only way in which the EPA can satisfy a mandatory duty is by actually discharging that obligation in the manner specifically required by the statute."); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-17 (1971) (in reviewing agency action "the Ninth Circuit must consider whether the decision was based on a consideration of the relevant factors.")

IV. EPA'S ELG REVIEW IS A JUDICIALLY REVIEWABLE ACTION.

Before the Ninth Circuit, EPA erroneously argued that under *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65-72 (2004) EPA's ELG review is not a reviewable "discrete action." *Norton* is not on point for several reasons, as the Ninth Circuit correctly held in *OCE I*.[13] One, *Norton* involved a challenge to a substantive agency program and held only that before such a substantive action can be challenged, it must be sufficiently narrow and "discrete." In this case, OCE is seeking review only of EPA failure to follow *mandated procedures in an environmental review*. If environmental reviews foreclose options on future specific action, such reviews themselves are reviewable final agency action even if they are broadly scoped. *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1089 (9th Cir. 2003). By determining whether ELGs will be updated, EPA's ELG reviews meet this test.

Even if, however, EPA's reviews of ELGs must be "discrete" actions to be subject to review, they would qualify. BLM's perpetual efforts at issue in

---

[13] The Ninth Circuit did not revisit this holding in *OCE II*.

Norton to implement broad mandates to manage vast tracts of federal land consistent with vaguely framed overall goals of balancing wilderness preservation against competing concerns is not analogous to EPA's CWA duty to review ELGs, as the Ninth Circuit correctly held. 506 F.3d at 795. Whereas BLM's amorphous actions at issue in *Norton* had no set end, the CWA gives EPA specific recurring deadlines to perform a single focused task: annually review its ELGs. Whereas the statutory provisions in *Norton* were too vague for judicial oversight, Congress has provided a clear basis for oversight in mandating that EPA consider specific criteria in reviewing EPA's discrete set of ELGs. *See also Environmental Defense Fund*, 870 F.2d at 898-900.

CONCLUSION

The Ninth Circuit's ruling in *OCE II* has created an intra- and inter-circuit split in authority in erroneously holding, contrary to its ruling in *OCE I*, that traditional principles of statutory construction and/or the framework for judicial review cannot be used to determine whether a statute imposes a mandatory duty on an administrative agency. Accordingly, to re-establish long-standing rules of statutory construction as they apply to an important question of administrative law, this Court should grant *certiorari*.

Respectfully submitted,

Michael A. Costa, Our Children's Earth
3701 Sacramento St. #194
San Francisco, CA 94118
(415) 342-0042
Counsel for Petitioners